



Office of the Attorney General
State of Texas

April 24, 1992

DAN MORALES
ATTORNEY GENERAL

Honorable Lena Guerrero
Chair, Texas Railroad Commission
1701 North Congress Avenue
Austin, Texas 78711-3967

OR92-168

Dear Ms. Guerrero:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 15155.

You have received a request for information in the possession of the Texas Railroad Commission (the "commission") provided by Westar Transmission Corporation (Westar).¹ Specifically, the requestor seeks "copies of code lists describing customers and corresponding code numbers for use on Annual Reports." You have submitted to us for review representative samples of the requested information. You claim that the requested information is excepted from required public disclosure by section 3(a)(10) of the Open Records Act.²

¹The requestor also seeks code lists for Cabot Gas Supply Corporation. We are advised, however, that Westar Transmission Corporation and Cabot Gas Supply Corporation are one and the same.

²You ask whether Open Records Decision No. 552 (1990), which held that code lists describing customers of Lone Star Gas Company, also excepts such code lists describing customers of other companies. Section 7(a) of the Open Records Act provides:

If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, *but there has been no previous determination that it falls within one of the exceptions*, the governmental body within a reasonable time, no later than ten calendar days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. (Emphasis added.)

Pursuant to section 7(c) of the act, we have notified the third party whose proprietary interests may be compromised by disclosure of the requested information. In response, we have received a letter from Westar. Westar contends that release of the requested information would reveal its customer list and pricing information and that the requested information constitutes confidential commercial or financial information. Westar also claims that the requested information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(4) of the Open Records Act.

Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Neither the commission nor Westar indicate how the requested information relates to a competitive bidding situation or to a commercial transaction to which the commission is party. Accordingly, the section 3(a)(4) exception may not be properly invoked.

Section 3(a)(10) excepts from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Westar claims that the requested information constitutes a trade secret.³ The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757, which holds a trade secret to be

(footnote continued)

The determination whether particular information constitutes a trade secret must be made on a case-by-case basis. Because Westar's code lists have not been addressed in a previous determination of this office, Open Records Decision No. 552 does not necessarily except them from disclosure.

³Westar also claims that the requested information is excepted from required public disclosure under the "commercial or financial information" branch of section 3(a)(10). Westar asserts that the requested information is excepted because its release would either 1) impair its ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained, citing Open Records Decision Nos. 494 (1988) and 309 (1982). Past open records decisions issued by this office relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 3(a)(10) to commercial information. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991), the logic of relying on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions relying on federal interpretations of exemption 4 in constructing section 3(a)(10) of the Open Records Act were overruled.

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. The Restatement lists six factors to be considered in determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757, cmt. b (1939). These factors are indicia of whether information constitutes a trade secret; depending on the information being considered, one factor alone may be indication of a trade secret. *See* Open Records Decision No. 552 at 3. Customer lists are not protected as trade secrets unless they meet these six criteria. Open Records Decision No. 494 (1988), *citing Expo Chemical Co., Inc. v. Brooks*, 572 S.W.2d 8 (Tex. Civ. App.--Houston [1st Dist.] 1978), *rev'd on other grounds*, 576 S.W.2d 369 (Tex. 1979).

Westar advises us that the requested information is provided on a confidential basis to the Railroad Commission and to the appropriate municipal regulatory authority, that access within the company to customer information is provided only on a need-to-know basis, and that Westar employees are required to sign a confidentiality agreement prohibiting disclosure of information gained in the course of employment with Westar. Westar also advises us that its customer list is of value to its business and that an extensive amount of time and money is expended in efforts to develop relationships with potential customers and maintain contact with current customers. Finally, Westar claims that duplication of the requested information would require direct inquiry of businesses in Westar's service area and the terms, conditions, and historic usage of the service.

We have considered Westar's arguments and examined the documents submitted to us for review. We have also considered the requestor's response. Westar has demonstrated that the requested information meets the six criteria listed in the Restatement of Torts, *supra*. Accordingly, we conclude that Westar has made a *prima facie* case for establishing a trade secret. The requestor has not rebutted Westar's showing. See Open Records Decision No. 552. You may withhold the requested information pursuant to section 3(a)(10) of the Open Records Act.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-168.

Yours very truly,

A handwritten signature in cursive script that reads "Mary R. Crouter".

Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GK/mc

Ref.: ID# 15155
ID# 15408
ID# 15485

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